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Supreme Court of the United States

October Term, 1995

GERALD E. PICKERING, et al.,

Cross-Petitioners,

v.

UNISYS CORPORATION,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where an ERISA plan states that when an employee retires, his medical benefits will continue for the rest of his life, but states elsewhere (without any cross-reference) that the company reserves the right to change or end the plans at any time; the general understanding among the company's executives, benefits counselors, which it systematically communicates to its employees, is that the reservation provision does not apply once an employee has retired; and the company *knows* that this is what its employees understand and that they are making retirement decisions based on this belief:

(1) May a court reject the interpretation actually given to the plan and communicated by the company's executives and counselors to employees (that the reservation of rights provision does not apply to employees once they retire), and hold as a matter of law that the reservation provision must prevail over the lifetime promise?

(2) Where an ERISA plan is susceptible to two reasonable interpretations, do the secret and uncommunicated intentions of select company executives control in resolving the ambiguity, or must the ambiguity be resolved under normal principles of contract interpretation and ERISA's protective purposes, based on the evidence of what the company communicated to its employees by its statements and actions and what it knew the employees understood?

(3) Where an employer has solicited employees to retire earlier than they would have, thereby foregoing earnings and benefits they would have earned had they retired later,

QUESTIONS PRESENTED – Continued

by promising that the medical benefits plans in effect when they retired will continue for the rest of their lives, and the employees accept the solicitation, is the employer bound by contract to continue to provide the promised benefits?

(4) Where a court determines that unqualified promises in an SPD that health benefits will continue after retirement for life are limited, as a matter of law, by provisions reserving the right to end or change benefits, is the company nevertheless estopped from exercising its right to terminate benefits by reason of its affirmative and systematic misrepresentations that once the employees retired, their medical benefits would continue for life, and its knowledge that the employees were making retirement decisions based upon the misrepresentations?

PARTIES TO THE PROCEEDINGS

Cross-Petitioners are Gerald E. Pickering, Fred Tonnies, William Leonhardt, Evelyn Schmidt, Dudley Keyes, David Kahl, Paul Wright, Robert Wilt, Clay Bernichon, Edward Valle, Robert B. Welsh, Solveig Tschann, Bernard J. Jansen, Donald I. Klippenstein, Frederick W. Hoppe, Ludson F. Worsham, Edwin Marjala and Warren J. Hall, individually and on behalf of all members of the Sperry Class previously certified by the district court whose claims have not been settled.

The Cross-Respondent is Unisys Corporation.

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Gerald E. Pickering, et al., ("Pickering"), respectfully cross-petition for a writ of certiorari to review the judgment of the court of appeals upholding dismissal of their contract and estoppel claims.

OPINIONS BELOW

The opinion of the court of appeals which is the subject of this cross-petition (App. 133a-155a)[1] is reported at 58 F.3d 1255. A related opinion of the court of appeals (App. 1a-26a), with which the first opinion was consolidated by the court of appeals for disposition, is reported at 57 F.3d 896. The opinion of the district court originally denying Unisys' motion for summary judgment on the contract and estoppel claims addressed in this cross-petition (App. 100a-120a) is reported at 837 F.Supp. 670. The opinion of the district court entering judgment against cross-petitioners on those claims (App. 28a-99a) is reported at 1994 WL 284079.

STATEMENT OF JURISDICTION

Pursuant to an October 3, 1994 order by the court of appeals consolidating four appeals for disposition (App. 136a n. 1), including appeals docketed by that court at Nos. 94-1800 and 94-1875, the judgment of the court of appeals in this case was entered on June 28, 1995. This conditional cross-petition is filed in response to Unisys' petition for a

[1] Appendix references (*e.g.*, App. 1a) are to the Appendices to Unisys' September 8, 1995 petition for certiorari.

writ of certiorari, which was docketed in this Court on September 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of ERISA are: 29 U.S.C. §§ 1002(1); 1002(5); 1002(16); 1002(19); 1002(21)(A); 1021-25; 1102; 1104(a); 1108(c); 1109(a); 1113; 1132(a); and 1132(c). They are reproduced in the appendix to the Petition at App. 156a-186a.

STATEMENT OF THE CASE

On November 3, 1992, Cross-Respondent Unisys Corporation ("Unisys" or "the company") announced that, effective January 1, 1993, it was terminating the health benefit plans under which it and its predecessors (the Sperry and Burroughs Corporations) had provided medical coverage to retired employees and their eligible dependents. Cross-petitioners are former employees of Sperry and Unisys who retired between 1969 and April 1, 1989 under 75 different plans providing medical benefits to active and retired employees. ("Retirees") They have challenged Unisys' termination of their benefits under ERISA on the ground that Sperry and then Unisys promised them before they retired that their benefits would continue for life without change. They assert causes of action based on breach of contract, equitable estoppel, and breach of fiduciary duty.

The Retirees' contract and estoppel claims turn on two provisions in each of the summary plan descriptions ("SPDs") in effect when they retired: (1) unqualified promises that, upon retirement, the employees' medical benefits would continue for the rest of their lives; and (2) general reservation of rights provisions ("RORs") reserving the right to change or end the plans at any time.

The Retirees contend that the conflict between the RORs and the lifetime promises renders the SPDs susceptible to two interpretations. Under the Retirees' interpretation, the RORs are limited by the lifetime promises; while the RORs permit Unisys to change benefits for active employee participants who have not yet retired, the lifetime promises "lock in" the benefits in place at the time the employees retire, for life. Under Unisys' interpretation, the lifetime promise is subject to the ROR and Unisys has the right to change the benefits even after the employee retires. The Retirees contend that their interpretation is reasonable because: (1) Unisys' contrary interpretation disregards the powerful meaning that the term conveys to lay readers of the SPD (see App. 113a n. 13); and (2) the Retirees' interpretation is the one that was systematically confirmed to employees by the company executives and counselors whose job it was to explain the plans. Under ordinary principles of contract construction applicable to determine which of the two interpretations should be given to the plans, the evidence of employer communications and conduct clearly supports the Retirees' interpretation, not the one proffered by Unisys.

The district court disagreed. Although it sustained the Retirees' breach of fiduciary duty claims based on the company's systematic and knowing assurances that "lifetime meant lifetime," it rejected the Retirees' contract and estoppel

claims on the ground that Unisys had effectively reserved the right to change or end the plans at any time. The court of appeals affirmed in all respects.

This conditional cross-petition addresses the court of appeals' decision on the Retirees' contract and estoppel claims. The court of appeals' ruling upholding the fiduciary duty claim is the subject of Unisys' petition for a writ of certiorari and the Retirees' brief in opposition.

Factual Background

Each of the Sperry plans stated without qualification that, upon an employee's retirement, his medical benefits would continue for life. The earliest of the "lifetime" plans, issued in 1969, stated:

> When you retire . . . the . . . coverage then in force for you and your eligible dependents will be continued at no cost to you for the rest of your life.

(A3120 [record below], 1969 Sperry Division summary plan description). By 1980, similar plans and plan language were adopted throughout the company. See Respondents' Brief in Opposition, p. 3.

Provisions reserving the right to change or end the plans appeared elsewhere in the plans, and beginning in 1982, were separated from the lifetime language by more than 80 pages without any cross-reference or other warning. See, *e.g.*, App. 37a, 47a. The standard reservation of rights provision ("ROR") stated: "The Company expects to continue the Plans, but reserves the right to change or end them at any time." (App. 37a). It did not state that it applied after retirement, or

that it overrode the unqualified promises of lifetime benefits which were stated elsewhere in the SPDs.

Despite its legal conclusion in Unisys' favor, the district court's factual findings fully support the Retirees' interpretation of these provisions: *i.e.*, that the RORs were limited by the SPDs' unqualified lifetime promises. The court found that there was an understanding among employees, and nearly every one of the company executives and benefits counselors who were responsible for explaining the plans, that the RORs did *not* apply once an employee had retired: *i.e.*, that the RORs only applied to active participants while they were still employed.[2] (App. 64a)

This understanding was shared by corporate executives at the highest level, including Sperry's Senior Vice President for Personnel (App. 39a), its Vice President for Insurance (App. 62a n. 51), and its Chief Financial Officer. (A8028-31) It was also shared by Divisional Human Resources Vice Presidents for its Univac Division (App. 46a-47a n. 27, App. 47a n. 28), Sperry Division (App. 59a n. 47; App. 84a n. 69), and Flight Systems Division (App. 55a), as well as the President of the Vickers Division (App. 49a n. 30) and numerous company

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[2] The company's key witness acknowledged at trial that he knew that Sperry employees were retiring under the belief that their medical coverage would continue uninterrupted for the rest of their lives (Tr. A2710-11 and A2676), that the SPDs were not clear (Tr. A2269, A2272-73), that a reasonable person could read the plans and miss the connection between the ROR and the lifetime language (Tr. A2670-71), that the placement of the RORs many pages from the lifetime language was misleading (Tr. A2667-68), and that in 1991 or 1992, after the company began to consider whether to terminate the plans, the company's in-house lawyers advised that the lifetime language in the plans might inhibit the company's ability to terminate benefits for existing retirees. (Tr. A2671-72)

benefits counselors whose job it was to explain the plan to employees. (See, *e.g.*, App. 84a n. 69)

The district court also found that it was the understanding of these company officials, and not the interpretation of the ROR asserted by Unisys, that was "confirmed repeatedly and systematically . . . by all levels of management, in writing and verbally." (App. 80a-81a; see Respondents' Brief in Opposition, pp. 3-5, citing to App. 80a-81a; see also 48a & n. 29, 52a-55a, 59a, 83a, and 84a nn. 68-69) Benefits managers counseled employees explicitly, despite the RORs, that their benefits would not be subject to change after they retired:

> [W]hichever [plan, Medflex or pre-Medflex] you take, you have to remember it's going to be for a lifetime.

and

> [You and your wife will] be guaranteed medical insurance as long as [you] live.

(A8235, A8271, assurances from benefits counselors, cited at App. 84a n. 68);

> So I wouldn't even think twice about it. And I mean that sincerely . . . [y]ou go with the medical and you have that, as far as I'm concerned, for life, okay . . . Same as you have now.

(A4673, Transcript from audiotaped Pre-retirement Seminar 1986, cited and quoted in part at App. 97a n. 76)

One Human Resources Vice President instructed that once employees retired, "[the Company's medical benefits promise] was a lifetime financial security that they could depend on." (App. 56a) Another testified to

> discussions [with employees] . . . how does that impact us with respect to our plans following retirement. Will that be changed? Will you modify those? And, no whatever. Whatever. Whatever was in effect remains in effect . . . .

(App. 84a n. 69; see also App. 59a). Benefits counselors told inquiring Retirees that:

> [the ROR] pertained to active employees and not to the retirees. That . . . once they received their medical benefit, they would be continued for their lifetime and their spouse's lifetime.

(App. 84a n. 69) and that their post-retirement medical benefits were "guaranteed to them for life." (*Id.*) The same message was confirmed for employees by the company's practice.[3]

Finally, the district court found that the company *knew* the effect of its assurances. It knew at "the highest levels of corporate management" (App. 83a) that employees believed that once they retired, their benefits would continue for life without change. And it also knew that employees were making retirement decisions based on this belief. (See Respondents' Brief in Opposition, p. 6: change in retirement coverage "can be a powerful motivation" to employees considering when to retire; desire to avoid benefit changes under a new plan "can tip the scale") According to Sperry's Senior Vice President for Personnel:

> We said this is yours for life. You have got it for life. And people made decisions on that. They

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[3] The company never reduced the medical benefits of employees who had already retired, even when it implemented reductions in retiree benefits for active employees who would retire in the future. (App. 79a)

> decide whether to go [*i.e.*, retire] or not go on the basis that they were told this is life.

(App. 39a n. 19)

Finally, Unisys solicited many employees (special early retirees) to retire early in order to protect their coverage under the benefit plans still in effect from reductions about to be implemented for future retirees. (App. 154a n. 20) One among many of these early retirees who testified at trial[4] is George Reiger, who asked his division's Human Resources Vice President whether there was any risk that his medical benefits could be changed after retirement if he took the company's offer. He was told no, that "[o]nce you retire and take your first pension check from the company . . . that's it" (Tr. A2534-35), and that by volunteering to retire he would protect himself "from any kind of a potential change that could result in a lesser medical coverage benefit than I now have." (Tr. A2532)

Proceedings And Decisions In The District Court

Early in the case, Unisys filed a motion seeking entry of summary judgment based on the RORs. The district court granted the motion on the Retirees' breach of fiduciary duty and estoppel claims, but denied summary judgment on the contract claim. In explaining its ruling on the contract claim,

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[4] Unisys' own documents acknowledge, for example, that "many employees had left in early 1989 in part to be grandfathered into the old retiree medical plans" (A8068-74, A4702) and that "[s]ome [employees] were induced to retire before the Unisys plan went into effect and may feel that the rules have been changed after the fact." (A8059-62; PX75 at B0001295)

the district court observed that: "the written promise of 'lifetime benefits' has powerful meaning to retiring employees" (App. 113a n. 13); the internal inconsistency between the unqualified, specific lifetime promises and generic RORs made the plans facially ambiguous (App. 111a, 115a); and a trial on the extrinsic evidence was required to resolve the ambiguity (App. 115a).

After the trial, at which the Retirees presented testimony from more than 50 witnesses, the district court reversed its position on both the contract and breach of fiduciary duty claims, entering judgment against the Retirees on the contract and estoppel claims and reversing its earlier dismissal of the breach of fiduciary duty claim. The district court reversed its position on the contract claims because it understood the court of appeals' decision in *Schoenejongen v. Curtiss-Wright*, 18 F.3d 1034 (3d Cir. 1994), *rev'd on other grounds*, 115 S.Ct. 1223 (1995), which was handed down during the trial, to require it to do so. "The *Curtiss-Wright* decision," the district court wrote, "suggests that there is nothing inconsistent about having lifetime language and a [sic] ROR in the same document. . . . I now conclude that my original analysis on this point was incorrect." (App. 71a, citation omitted). The district court thus read *Curtiss-Wright* to establish a *per se* rule that an ROR always "trumps" a promise of lifetime benefits, thus rendering the Sperry plans unambiguous as a matter of law.

The district court also held that even if the plans were ambiguous, the extrinsic evidence did not support the Retirees' interpretation. The court reached this conclusion based almost entirely on inferences about subjective intentions of certain company executives that were never communicated to the Retirees (App. 75a-77a) and despite its findings

about what actually *was* communicated by the company's words and actions, *i.e.*, that: (1) the company systematically told its employees without qualification that their benefits would continue for life; (2) it told many explicitly that their benefits would not be subject to the RORs once they retired; (3) the company never reduced the benefits of retirees even when it reduced benefits for active employees.

At the same time, the district courted rejected the Retirees' estoppel claim and the separate contract claim of the special early retirees like Rieger. (App. 65a, 86a) The court rejected these claims for the same reason it rejected the Retirees' general contract claim, because the promised benefits were to be provided under the same SPDs, containing the same RORs, that covered the Retirees generally. (App. 155a)

On the breach of fiduciary duty claim, which is the subject of Unisys' petition for a writ of certiorari and respondents' brief in opposition, the court reconsidered its original grant of summary judgment and reinstated the Retirees' claim. (App. 83a; see Respondents' Brief in Opposition, p. 8).

Proceedings In The Court Of Appeals

The court of appeals affirmed the district court in all respects. In rejecting the Retirees' contract claim, the court adopted the company's interpretation of the plans as one compelled by law, holding that the lifetime language was unambiguously limited by the RORs. In doing so, however, the court did not actually conclude that the Retirees' interpretation – *i.e.*, that the lifetime language limited the RORs – was *unreasonable,* holding instead that "[t]he presence of lifetime language and the reservation of rights clauses here did not *necessarily* render the . . . plans ambiguous" (App.

147a n. 11, emphasis added). The court nonetheless concluded as a matter of law that "[w]here . . . the reservation of rights is broad and unequivocal, it will prevail over a promise of lifetime benefits." (*Id.*)

The court also affirmed the district court's alternative analysis of the extrinsic evidence, suggesting that ERISA plans presented "special interpretational problems" that warranted deviation from traditional contract interpretation principles. (App. 152a n. 16) In affirming the district court's conclusion that the "lifetime promises" in the plans did not manifest an intent on the part of the company to vest benefits, it gave controlling weight to internal company conduct that was not known or ever communicated to the Retirees, including the company's use of the word "vested" in its Executive Medical Plan given to top-level executives. (App. 149a-150a) The court of appeals refused to consider, on the other hand, the Retirees proof of what *was* communicated: (1) by what the company systematically told employees in explaining the plans, and (2) by how the company applied the plans in practice; and it refused to consider what the company knew its employees understood the plans to mean. Thus, the court applied the incorrect legal standard in analyzing the extrinsic evidence, contravening the basic principle that the interpretation of an ambiguous contract does not turn on the undisclosed intentions of one contracting party, but turns rather on the meanings *communicated* by the parties to each other by their words and actions. See *Corbin on Contracts*, 1951, § 538 at 71, 63.[5]

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[5] The court's explanation of its refusal to consider the evidence of what the company actually communicated – because such evidence "cannot be used to contradict the unambiguous written terms of an ERISA plan"

The court of appeals also affirmed the district court's rejection of the Retirees' estoppel claim and the separate contract claim of the special early retirees. In rejecting the estoppel claim, the court recognized that ERISA permits equitable estoppel where the participant proves a material misrepresentation, reasonable and detrimental reliance upon the representation, and extraordinary circumstances. (App. 153a-154a) Although it found that Unisys had materially misrepresented the plan (App. 154a n. 20), and that it did so knowing both that the employees were misled and that they were retiring in the belief that their benefits were not subject to change after they retired (App. 154a), it rejected the Retirees' estoppel claim based on the presence of RORs. (App. 155a) It also rejected the separate contract claim of the special early retirees for the same reason, *i.e.*, because the plans Unisys promised to continue in return for their retiring early were the same plans applicable to the Retirees generally, containing the same lifetime promises and the same RORs.

Finally, the court of appeals sustained the breach of fiduciary duty claim that is the subject of Unisys' petition for writ of certiorari, concluding that the record evidence of Unisys' "systematic campaign of confusion" clearly supported that claim. (App. 20a, 21a; see Respondents' Brief in Opposition, pp. 9-10)

(App. 152a n. 16) – makes little sense given that the extrinsic evidence analysis performed by the district court, which the court of appeals affirmed, was undertaken on the possibility that the SPDs might ultimately be determined to be ambiguous. The court of appeals' concern over the use of extrinsic communications to contradict "*unambiguous*" plan terms was therefore not implicated.

REASONS FOR GRANTING THE WRIT

I. If Review Is Granted Of The Lower Court's Ruling On Fiduciary Breach, This Court Should Grant Review Of The Other Rulings As Well, To Ensure That The Case Is Reviewed In Its Full Context

This case is best reviewed in its full context, with the Court considering all theories of ERISA liability asserted. If this Court decides to review the lower court's ruling that Unisys' knowing misrepresentations constituted a breach of fiduciary duty, it should also grant review of the rulings on the Retirees' contract and estoppel claims.

Fundamentally, claims like those the Retirees have made, for breach of promise on the one hand, and for misrepresentations (based on breach of fiduciary duty and estoppel) on the other hand, are natural alternatives. Where an employer's representations are considered to define the terms of the contract, the contract claim will be upheld and the misrepresentation claims become superfluous. Where the misrepresentations are held not to define the contract, the contract claim will be rejected but, if the misrepresentations are found to be knowing and material, the alternative misrepresentation claims will be sustained to ensure that the employer is held responsible for the harm it has knowingly caused.

II. The Court Should Grant Review To Resolve The Conflict Among The Circuits About The Standards Of Interpretation To Be Applied Under ERISA In Deciding Whether An Employer Has Agreed To Pay Retiree Health Benefits For Life

The lower court's dismissal of the Retirees' contract claims should be reviewed on the additional ground that the lower court improperly contravened established principles of contract interpretation in deciding this case. Review of the lower court's decision would permit the Court to resolve confusion among the courts of appeals as to whether the traditional contract interpretation principles that ordinarily apply to ERISA plans,[6] also apply to the interpretation of

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[6] *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-113 (1989), in which this Court reviewed a benefit claim "as it would have reviewed any other contract claim – by looking to the terms of the plan and other manifestations of the parties' intent." Indeed, the courts of appeals have commonly applied contract principles in cases involving benefit termination, like this one. *E.g.*, *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 93, 96 (3d Cir. 1992); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 544 (4th Cir. 1992); *Policy v. Powell Pressed Steel*, 770 F.2d 609 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 291 (1993); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 701-702 (11th Cir. 1993); *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990); *DeGeare v. Alpha Portland Indus. Inc.*, 837 F.2d 812 (8th Cir. 1988), *vacated on other grounds*, 489 U.S. 1049 (1989); *Anderson v. Alpha Portland Indus. Inc.*, 836 F.2d 1512, 1519 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Jensen v. SIPCO*, 38 F.3d 945, 949 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 1428 (1995); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984); *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 538-541 (9th Cir. 1990), *cert. denied*, 498 U.S. 1013 (1990); *see also UAW v. Yard-Man*, 716 F.2d 1476 (1983), *cert. denied*, 465 U.S. 1007 (1984) (health benefits that accrue upon retirement create inference of vesting). *But cf. Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 114 S.Ct. 196

reservation of rights provisions in such plans, or whether reservation of rights provisions are to be given a special, talismanic meaning which is entirely contrary to the interpretation actually communicated to the Retirees.

In the present case, both the district court and the court of appeals adopted Unisys' interpretation of the plan as a matter of law, although they did not (and could not) hold that the Retirees' interpretation of the plans was unreasonable. Indeed, when the district court first construed the plans, it held that they were ambiguous (recognizing that "the written promise of lifetime benefits has a powerful meaning to retiring employees") and only changed its view after the court of appeals decided *Curtiss-Wright, supra*. And at trial, not only did Unisys' own key witness admit that the plans were unclear and misleading, but the Retirees also proved that nearly every executive, manager and benefits counselor responsible for explaining the plans understood and communicated to the employees that the RORs were limited by the lifetime promises.

In refusing to acknowledge that the SPDs were susceptible to the Retirees' interpretation, and thus ambiguous, the court of appeals contravened: (1) fundamental principles of interpretation, (2) ERISA's statutory purpose to protect employees' reasonable expectations, and (3) the statute's requirement that SPDs be written in a manner that can be

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(1993); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1442 (1995); and *Curtiss-Wright Corp. v. Schoonejongen, supra*, and the present decision below, 58 F.3d at 901-02, App. 143a-44a (requiring clear and express waiver of right to modify benefit, such that participants lose if the contract is ambiguous, because the waiver is not sufficiently clear).

clearly understood by the average employee, 29 U.S.C. §§ 1001, 1022(a), and instead created a *per se* rule elevating the ROR to a controlling status above any other plan term, regardless of overwhelming evidence of what Unisys had communicated, and knew its employees understood, about their plans.

III. The Court Should Grant Review To Resolve The Conflict Between The Third And Eighth Circuits Over Whether RORs Are Subject To Traditional Contract Interpretation Principles

The Court also should grant review to resolve the direct conflict between the only courts of appeals that have considered whether a plan that contains both an unqualified promise of lifetime benefits and an ROR is ambiguous.[7] While the Third Circuit held in the present case that the ROR must prevail over the lifetime language as a matter of law, the Eighth Circuit has held that a plan containing both lifetime language and an ROR is ambiguous, and that extrinsic evidence must be considered to resolve the ambiguity. In *Jensen v. Sipco Inc.*, *supra*, that court of appeals held ambiguous a plan stating that retiree benefits would terminate "at death,"

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[7] In addition, and contrary to the lower court's decision giving controlling weight to the RORs, the Seventh, Eighth and Eleventh Circuits have found plans ambiguous even without express lifetime language. *Bidlack v. Wheelabrator*, *supra*; *Stewart*, *supra*; and *Morrell v. United Food and Commercial Workers International Union*, 37 F.3d 1302, 1307-8 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 2251 (1995). Compare with *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988); *Alday v. Container Corp. of America*, 906 F.2d 666 (11th Cir. 1990) (no vesting under plans with RORs, but no lifetime language), *cert. denied*, 498 U.S. 1026 (1991).

but also containing an ROR that did not distinguish between active employees and retirees, and concluded based on extrinsic evidence that the retirees' benefits had vested. In *DeGeare v. Alpha Portland Indus. Inc.*, *supra*, and *Anderson v. Alpha Portland Indus. Inc.*, *supra*, the same court found ambiguity in plans containing both lifetime language and an ROR, and resolved the conflict between the two provisions based on the extrinsic evidence, albeit against vesting.

The Court should also grant review to decide what evidence may or may not be considered in an extrinsic evidence analysis to determine the "intent" behind an ambiguous plan. As explained by Professor Corbin, such "intent" does not turn on undisclosed beliefs or conduct on the part of one party, but on the meanings *communicated* by the parties.

> In every case involving interpretation, the parties have used expressions, *both words and other acts*. The court is not searching for an expressed mental state; instead it is searching for the meanings that each party *intended to convey by his words and act*, and for the meanings that those words *conveyed* to the other party . . .

Corbin on Contracts, 1951, § 538 at 71 (emphasis added).

> In interpreting the words of a bargain . . . the court should give much less weight to what it thinks the party who used the words *actually meant* than to what it is convinced that the other party *actually understood them to mean*, provided that the first knew or had reason to know that the second party did so understand them.

Id. at 63 (emphasis added).

The district court's conclusion that the company did not *intend* to vest benefits, on which the court of appeals relied,

applied an incorrect legal standard to the evidence. It disregarded the overwhelming evidence of what the company actually communicated to the employees and gave controlling effect to Unisys' evidence of purely subjective intentions on the part of few executives, which were never disclosed to the Retirees. This preoccupation with undisclosed intentions departs from traditional contract interpretation principles and ERISA's purposes and disclosure rules, and would preclude employees from ever showing that a contrary reasonable interpretation should prevail, no matter how overwhelming the evidence supporting their position.[8]

IV. The Court Should Grant Review To Resolve A Conflict Among The Circuits On The Application Of Equitable Estoppel In Benefit Termination Cases

Finally, this cross-petition should be granted to resolve the conflict among the courts of appeals about whether a participant may sue under ERISA to estop an employer from relying on plan provisions which it has misrepresented to its

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[8] If the company secretly intended to make its unqualified promises of lifetime benefits subject to so devastating a "catch," (*i.e.*, the ROR), the plans failed to so advise employees clearly and prominently, and thus violated the command of the statute, 29 U.S.C. § 1022, and the Department of Labor's standards for clarity as expressed in 29 C.F.R. § 2520.102-2. *See Ruotolo v. Sherwin-Williams Co.*, 622 F. Supp. 546, 550 (D. Conn. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224 (9th Cir. 1984); *White v. Key Choice Welfare Ben. Plan*, 827 F.Supp. 690, 693, 697 (D. Wyo. 1993); *Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1185 (3rd Cir. 1985). As the district court found, most of the RORs were physically removed from the lifetime promise (Op. 2278 n. 63), many by more than 80 pages. Despite the cross-referencing requirement in 29 C.F.R. § 2520.102-2, the RORs are not referenced in the benefit description and do not themselves state that they apply to the "lifetime" benefit.

employees, despite the presence in the plan of an ROR.[9] In the present case, the court of appeals recognized that Unisys actively misrepresented to its employees that their benefits would continue for life after they retired, and knew that the employees were making important retirement decisions based on this belief. However, the court of appeals rejected the Retirees' estoppel claim because it determined as a matter of law that reliance on the company's repeated misrepresentations could not be reasonable in the face of the RORs, as they were ultimately construed only after two years of litigation. This decision should be reviewed for two reasons.

First, it is premised on the court's earlier conclusion that the RORs made the SPDs unambiguous as a matter of law, when the record showed that the SPDs were susceptible to more than one interpretation, including the one that was asserted by the Retirees and shared and communicated almost universally by Unisys' executives and benefits counselors.

Second, the courts of appeal are in conflict over whether the presence of an ROR necessarily defeats reasonable reliance for purposes of an estoppel claim. In *Armistead v.*

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[9] There is no conflict about the availability of estoppel in cases involving welfare plans, but only as to its application. Virtually every court of appeals, including the court of appeals in the instant case, has recognized the availability of equitable estoppel claims under ERISA to remedy an employer's knowing misrepresentations. *See Pierce v. Security Trust Life Insurance Company*, 979 F.2d 23 (4th Cir. 1992); *Wise v. El Paso Natural Gas, supra* (5th Cir.); *Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Miller v. Taylor Insulation Company*, 39 F.3d 755 (7th Cir. 1994); *Greany v. Western Farm Bureau Life Insurance Co.*, 973 F.2d 812 (9th Cir. 1992); *Averhart v. U.S. West Management Pension Plan*, 46 F.3d 1480 (10th Cir. 1994); *Kane v. Aetna Life Ins.*, 893 F.2d 1283 (11th Cir.), *cert. denied*, 498 U.S. 890 (1990).

Vernitron Corp., *supra*, the Sixth Circuit held that an employer was equitably estopped from terminating retirement benefits despite the inclusion in the plan of language reserving the right to terminate or modify the plan. As applied to the circumstances of this case, in which the company repeatedly and systematically misrepresented the plan and *knew* that Retirees were retiring based on the understanding those misrepresentations conveyed, and nearly every Unisys manager *shared* this understanding, the court's conclusion that the Retirees' reliance was "unreasonable" is divorced from the reality the Retirees proved at trial.

Moreover, neither of the decisions cited by the court of appeals below, *Gordon v. Barnes*, *supra*, and *Alday v. Container Corp. of America*, *supra*, supports the court's rationale. (App. 155a) In *Gordon*, the Sixth Circuit rejected the plaintiffs' estoppel claim because the plaintiffs could not show *detrimental* reliance. Not only did it *not* consider whether reliance could have been reasonable, but it reiterated the observation it made in *Armistead*, that *if* the employees could demonstrate that they had been harmed, an estoppel claim would lie despite the presence of an ROR. 999 F.2d at 137-38. In *Alday*, moreover, the plan had an ROR but no countervailing "lifetime" language. 906 F.2d at 665. Even so, the court cautioned that its ruling against plaintiffs on the estoppel claim did not insulate employers from liability for fraudulent (*i.e.* knowingly false) promises, even if those promises contradicted plan terms. 906 F.2d at 666 n. 15.

CONCLUSION

If this Court grants Unisys' petition for a writ of certiorari, this conditional cross-petition should also be granted so that the issues may be reviewed in their full context.

Respectfully submitted,

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